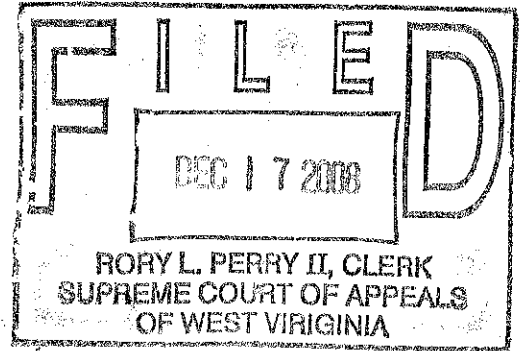


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34426

MOUNTAIN AMERICA, LLC; FEROZ ALLOO, ROBERT AND BEVERLY AMICO; RON ANDREWS; WILLIAM ANDREWS; REED ATKINS; WILLIAM AND NANCY ATKINS; SERGIO AND CHERYL BAEZ; THANOS BASDEKIS; EDWARD AND TRACY BOBER; PETER CALDERON; JIMMY CARROLL; CHRIS AND DINA CASHWELL; WAYNE CLIBURN; JUSTIN AND MARY DALY; PETER AND SHERRY DELCIPPO; JOHN EAGLE; DALE AND MICHELLE ENZOR; CHARLES AND CYNTHIA EVANS; WILLIAM FARLEY; LON FOUNTAIN; FERNANDO GARCIA; JONATHAN HALPERIN; ESTHER HALPERIN; MIKE AND VIVIAN HOLLANDSWORTH; JAN JERGE; CARLOS AND CINDY KINSEY; JUDY LEON; FRED A LIVESAY; VICTOR LONG; JIM AND SHAYNA MACKEY; JEAN JACQUES MILLARD; MATTHEW MYERS; WILLIAM AND CAROL NEWMAN; JONATHAN AND ERIN PANKS; STEPHEN AND LAUREN RICE; MICHAEL ROBEY; HEE SOO ROH; GEORGE ROSS; ROBERT SCHLOSSBERG; NEIL PATRICK WELSH; TEDDY KIM; OBIE WOODS, JR.; GULAM YOUNOSSI; SALVATORE ZAMBRI; WBMA, LLC; WALNUT RIDGE, LLC; SUGAR TREE, LLC; JF INVESTMENT HOLDINGS; GREENTREE, LLC; AND ZAMBRI ENTERPRISES, LLC



Appellants, Petitioners below,

v.

THE HONORABLE DONNA HUFFMAN,
ASSESSOR OF MONROE COUNTY, WEST VIRGINIA
and
THE HONORABLE H. ROD MOHLER, ESQUIRE,
PROSECUTING ATTORNEY OF
MONROE COUNTY, WEST VIRGINIA
and
THE COUNTY COMMISSION OF
MONROE COUNTY, WEST VIRGINIA,

Appellees, Respondents below.

**RESPONSE OF APPELLEE, DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY,
WEST VIRGINIA, TO APPELLANTS' BRIEF**

Respectfully submitted,

John F. Hussell, IV - WV State Bar No. 6610

Katie L. Hoffman - WV State Bar No. 9672

Joseph J. Buch - WV State Bar No. 6014

DINSMORE & SHOHL, LLP

900 Lee Street, Suite 600

P.O. Box 11887

Charleston, WV 25339-1887

Telephone: (304) 357-0900

Counsel for Appellee, Donna Huffman, Assessor of
Monroe County, West Virginia

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I. INTRODUCTION

Appellee, Donna Huffinan, as the Assessor of Monroe County, West Virginia, by counsel, John F. Hussell, IV, Katie L. Hoffman, and Dinsmore & Shohl, LLP, submits this brief in response to Appellants' Brief filed by Mountain American, LLC along with several disgruntled landowners who own real property located in Walnut Springs Mountain Reserve. The Assessor respectfully requests that the Court affirm the ruling of the Circuit Court of Monroe County of January 25, 2008. As set forth in full detail below, the County Commission of Monroe County, sitting as the 2007 Board of Equalization and Review, and the Circuit Court of Monroe County correctly held that the Appellants failed to show by clear and convincing evidence that the assessments in question are erroneous and/or excessive.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

On or about January 15, 2007, Appellants filed with the Clerk of the County Commission a notice of objection to their ad valorem property tax assessments for the 2007 tax year with respect to real property located in the Walnut Springs Mountain Reserve development on Bud Ridge Road near Union, Monroe County, West Virginia. At the Hearing of February 7, 2007, the County Commission of Monroe County, sitting as the 2007 Board of Equalization and Review, heard the testimony of witnesses and arguments of counsel regarding the Appellants' objections to the assessments. On February 15, 2007, the County Commission of Monroe County, sitting as the 2007 Board of Equalization and Review, issued its Order affirming the assessment values determined by the Assessor on the properties at issue.

On March 14, 2007, only the Appellant, Mountain America, LLC, filed a Petition for Appeal from Ad Valorem Property Tax Assessments with the Circuit Court of Monroe County. On March

28, 2007, Respondent, the County Commission of Monroe County, West Virginia, filed a Response with the Circuit Court of Monroe County. On April 13, 2007, Appellee, Donna Huffman, filed a Response with the Circuit Court of Monroe County, West Virginia.

On July 18, 2007, the Circuit Court entered an "Order Granting County Commission's Motion to Confirm Mountain America, LLC, as the Sole Property Owner which has Perfected an Appeal." Accordingly, Mountain America, LLC is the sole property owner which perfected an appeal in the Circuit Court and should now be the sole appellant in this Appeal. Additionally on July 18, 2007, the Circuit Court of Monroe County denied the Appellants' "Motion to Amend Petition for Appeal." In denying the Motion to Amend the Petition for Appeal, the Circuit Court found that the Appellants' late assertion of unconstitutionality of the appeal structure of tax assessments would greatly broaden the scope of the processing and defeat the statutory purpose of achieving an expeditious resolution of tax assessment issues. On September 18, 2007, the Circuit Court of Monroe County heard oral arguments from all counsel on Mountain America's Brief in Support of Appeal from *Ad Valorem* Property Tax Assessments.

On January 25, 2008, the Circuit Court of Monroe County issued its Order Denying Plaintiff's Petition for Appeal from *Ad Valorem* Property Tax Assessments. It is from this Order that the Appellants make their appeal to this Court. On May 28, 2008, Appellants filed their Petition for Appeal to this Court. By Order dated October 9, 2008, this Court granted the Appellants' Petition for Appeal. On November 14, 2008, Appellants filed with this Court their Appellants' Brief as directed by the Order of October 9, 2008. Appellee, Donna Huffman, as the Assessor of Monroe County, West Virginia, respectfully hereby responds to Appellants' Brief set forth in more detail below.

III. STATEMENT OF FACTS

Donna Huffman is the duly elected Assessor of Monroe County, West Virginia. *Board of Equalization and Review Hearing*, p. 68 (Feb. 7, 2007) [hereinafter *Hearing Transcript*]. Ms. Huffman is charged with assessing yearly as of the 1st of July the true and actual value of all property located within the County. *Hearing Transcript*, p. 70-72. During the period from July 1, 2006, to January 31, 2007, Ms. Huffman and her staff ascertained the true and actual value of all property, real and personal, subject to *ad valorem* property taxation located within Monroe County, West Virginia. *Id.* As prescribed by West Virginia law, all real property located in Monroe County, West Virginia is reassessed every three (3) years. *Id.* at 85. Additionally, it is the Assessor's duty to assess all real property at sixty percent (60%) of its fair market value. *Id.* at 73.

Included in the valuation for the 2007 tax year was the recent development commonly known as Walnut Springs Mountain Reserve (hereinafter "Walnut Springs"). *Id.* at 95-96. Walnut Springs is a residential development comprised of approximately 1,000 acres located on Bud Ridge Road near Union, Monroe County, West Virginia. *Id.* at 98-99. During the last few years, Mountain America, LLC and its affiliated entities have undertaken to develop Walnut Springs into a residential housing development. Mountain America, LLC and its affiliated entities have been selling lots or tracts of property located in the Walnut Springs Mountain Reserve development since September, 2004. *Id.* at 87, 97-98.

Prior to the election of Ms. Huffman as Assessor, Monroe County had historically assessed some real property in the County at an amount below sixty percent of its fair market value. *Hearing Transcript*, p. 92. As a result of these prior deficiencies, Ms. Huffman submitted a detailed plan of action to correct the deficiencies in the assessment of real property in Monroe County to the Property Valuation Training and Procedures Committee (PVC). *Id.* at 93. In accordance with the proposed

plan of action, Donna Huffman, as the Assessor of Monroe County, increased all real property assessments throughout Monroe County six percent by (6%) for the 2006 tax year. *Id.* at 92. Further, in accordance with the proposed plan of action, Donna Huffman as the Assessor of Monroe County increased all real property assessments throughout Monroe County fifteen percent (15%) for the 2007 tax year. *Hearing Transcript*, p. 95. Notwithstanding the foregoing, it is the Assessor's position that any historical concerns with respect to the real property assessments have no bearing upon the question of whether or not the Appellants' 2007 *ad valorem* property assessments accurately represent the true and actual value of their real property at the time of their assessment.

During the period of July 1, 2005, to June 30, 2006, the purchase price of the unimproved real property sold by Mountain America, LLC and its affiliated entities was significantly higher than any other unimproved real property being sold elsewhere in Monroe County, West Virginia. *Id.* at 96. As a result of the higher consideration being paid for the lots located in the Walnut Springs Mountain Reserve development, Donna Huffman, after consulting the State of West Virginia Department of Revenue, created a new neighborhood which contained all of the real property located in the Walnut Springs Mountain Reserve development on Bud Ridge Road near Union, Monroe County, West Virginia. *Hearing Transcript*, p. 96.

In creating the neighborhood, Ms. Huffman considered the following information concerning the real property: parcel size, roads, topography, cost, type, and quality of improvements. *Id.* at 99, 104. In calculating the 2007 real property assessments for the Walnut Springs Mountain Reserve neighborhood, Ms. Huffman compiled a list of sales in the development for the period from July 1, 2005, to June 30, 2006. *Id.* Next, Ms. Huffman calculated the price per acre for each sale which occurred during the period from July 1, 2005, to June 30, 2006. *Id.* at 97, 104-106. Once the price per acre for each sale was calculated, Ms. Huffman took the average of all sales during the period of

July 1, 2005, to June 30, 2006. Id. The calculated unit price per acre was \$29,236.00, a figure significantly higher than any other real property sales in Monroe County. Id. at 97-99.

In an attempt to lower the per acre assessment in the neighborhood as an accommodation to the disgruntled landowners, Ms. Huffman struck the two highest sales and the two lowest sales and recalculated the average price per acre. *Hearing Transcript*, pp. 97-99. The calculated unit price per acre based on actual sales was \$28,502.00. Id. Once Ms. Huffman entered the neighborhood information into the real estate mass appraisal software (CAMA), she again lower the assessment per acre to \$26,900.00 in a further attempt to lower the tax burden on the disgruntled landowners. Id. After all of the neighborhood values were entered into the real estate mass appraisal software (CAMA), the software calculates the residual property value for the neighborhood. The residual property value for the Walnut Spring Mountain Reserve neighborhood is approximately \$5,400 per acre, a figure significantly lower than the asking price for such acreage. *Hearing Transcript*, pp. 105-106.

As of February 7, 2007, Mountain America, LLC, in contravention of W.Va. Code § 11-3-1b (2008), failed to place a plat of the Walnut Springs Mountain Reserve development on Bud Ridge Road near Union, Monroe County, West Virginia of record in the Office of the Clerk of the County Commission of Monroe County, West Virginia. Id. at 97. Walnut Springs Mountain Reserve is, however, subject to those certain "Amended and Restated Declaration of Covenants, Conditions, Restrictions, Reservations, and Easements for Walnut Springs Mountain Reserve a Residential Home Developments Near Union, West Virginia dated April 8, 2005" (Restrictive Covenants) which is of record in the Office of the Clerk of the County Commission of Monroe County, West Virginia in Deed Book 242, at Page 398. Id. at 101, 107 - 108. The aforesaid Restrictive Covenants provide that the "lots shall be used for residential and personal recreation purposes; no business, commercial

or professional enterprises which regularly attract customers, patrons, or clients shall be permitted or conducted thereon, except as approved by the Developer." Id. at 101. Consequently, Ms. Huffman assessed the residue of the Walnut Springs development as undeveloped residential property. Id. at 101 - 102. For the 2007 tax year, all of the real property owned by Mountain America, LLC and its related entities is assessed as "residue," resulting in a lower assessment than would occur if the remaining real property was assessed as individual lots as marketed by the developer. Id. at 80.

In assessing each property in the Walnut Spring Mountain Reserve development, Ms. Huffman verified the property owner's name, address, and the description of the real property. Id. at 100. Also, after each transfer of real property in Monroe County, Ms. Huffman mailed to the purchaser a "Classification and Sales Confirmation Questionnaire" to confirm that the sales price of the property was the actual market value of the real property transferred. *Hearing Transcript*, p. 100. In addition, she visually inspected the real property, determined the property class, recorded the neighborhood code, and determined the infrastructure of the development. Id. at 99, 101 - 103. Currently, all vacant real property in the Walnut Springs Mountain Reserve development is assessed as Class III property. Id. at 101. Class I property consists of intangibles such as taxable stocks, bonds and promissory notes. Owner occupied properties used exclusively for residential purposes and farms are Class II property. Property that is not Class I or II property is Class III property if it is located outside a municipality. If such property located inside a municipality, it is Class IV property.

On or about January 9, 2007, Donna Huffman, in her capacity as the Assessor of Monroe County, West Virginia, provided notice to Mountain America, LLC of an increase of assessment of real property for the forthcoming 2007 tax year. Id. at Ex. J1. Ms. Huffman provided Mountain America, LLC and the several dozen individual property owners by first class mail, postage prepaid, a "Notice of Increase of Assessment" in which all of the disgruntled landowners were notified of the

current real property assessment for the 2007 tax year. Specifically, Ms. Huffman notified the disgruntled landowners that the assessed value of their parcels of real property located in Monroe County, West Virginia would increase by at least ten percent (10%) from the previous tax year. Id.

IV. STANDARD OF REVIEW

An appeal to the circuit court for the reduction of an assessor's valuation for the taxation of land is heard solely on the record before the County Commission, sitting as the Board of Equalization and Review. Syl. Pt. Gilbert v. County Court of Wyo. County, 121 W. Va. 647, 5 S.E.2d 808 (W. Va. 1939); *see also* W. Va. Code § 11-3-25 (2008). The Appellants have the burden of proof to establish that Donna Huffman, as the Assessor of Monroe County, wrongly assessed the property in question. An objection to any assessment may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been undervalued or overvalued by the assessor. Syl. Pt. 8, Killen v. Logan County Comm'n, 170 W.Va.602, 295 S.E.2d 689 (W. Va. 1982). In the present matter, the County Commission, sitting as the Board of Equalization and Review, correctly applied the law to the facts. The Appellants failed to prove by clear and convincing evidence that the assessments in question are incorrect. See Syl. Pt. 5, in part, In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, ____ S.E.2d ____, 2008 WL 4868290, November 5, 2008 (No. 33891) ("A Taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such assessment is erroneous"). Instead, Mountain America, LLC argues that other real property in Monroe County is underassessed by the Assessor. This is insufficient to overcome the presumption that the Assessor's appraisal of the tracts in question is correct.

A circuit court's entry of a final order is reviewed under an abuse of discretion standard. Syl. Pt. 1, In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, ____ S.E.2d

_____, 2008 WL 4868290, November 5, 2008 (No. 33891). The Supreme Court of Appeals of West Virginia reviews challenges to findings of fact under a clearly erroneous standard. *Id.* Conclusions of law are reviewed *de novo*. *Id.* Further, the interpretation of a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review. Syl Pt. 2, In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, _____ S.E.2d _____ 2008 WL 4868290, November 5, 2008 (No. 33891). An assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong. Syl. Pt. 3, In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, _____ S.E.2d _____, 2008 WL 4868290, November 5, 2008 (No. 33891).

V. RESPONSE TO ASSIGNMENTS OF ERROR

The Circuit Court of Monroe County, by its Order dated January 25, 2008, correctly concluded that Mountain America, LLC failed to prove by competent evidence that the Assessor of Monroe County erroneously valued real property for *ad valorem* property tax assessments purposes. Appellants' assert five assignments of error with regard to the Circuit Court's ruling:

1.) The Circuit Court erred in affirming the failure of the Commission to equalize the 2007 taxable values of the Appellants' properties in violation of the mandate of the West Virginia Constitution that taxation must be applied equally and uniformly throughout the state;

2.) The Circuit Court erred in concluding that the excessive and unequal 2007 tax assessments of the Appellants' properties were not the result of intentional and systematic under-assessments by the Assessor of other taxpayers' properties in Monroe County in violation of the Appellants' constitutional rights to equal protection of the law;

3.) The Circuit Court erred, as a matter of law, and disregarded the facts of this case, in concluding that West Virginia's statutory system for review of property tax assessments does not violate the Appellants' rights to due process of law;

4.) The Circuit Court erred, as a matter of law, and disregarded the facts of this case, in concluding that the particular manner, by which the commission used the statutory procedures for review of the Appellants' property tax assessments, did not operate to effectively violate the Appellants' rights to due process of law; and

5.) The Circuit Court erred, as a matter of law, in denying the right of all but one of the Appellants' to any judicial review of the decision of the Commission sustaining the excessive and unequal taxable values of their property.

None of these five assignments of error withstand careful judicial scrutiny. Interestingly, Appellants failed to allege or assert an assignment of error that the Circuit Court and the County Commission erred in not reducing the appraised value of the Appellants real property to its true and actual value as required by West Virginia law. Further, none of the Appellants presented any evidence as to the value of their own real property; rather, the Appellants only argue that other real property in Monroe County is underassessed. It is not unreasonable or unfair to require a disgruntled landowner claiming to have superior knowledge of the value of its own property to shoulder the burden of presenting such evidence to the Board of Equalization and Review. In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, ___ S.E.2d ___, 2008 WL 4868290, November 5, 2008 (No. 33891). Further it is not a denial of due process to impose a more stringent standard upon a disgruntled landowner in an attempt to prevent frivolous tax assessment challenges. Id. Essentially, the Appellants make this appeal one of denial of due process and equal protection which this Court has already considered on multiple occasions.

VI. POINTS AND AUTHORITIES RELIED UPON

U.S. SUPREME COURT CASES

<u>Allegheny Pittsburgh Coal Co. v. County Commission of Webster County</u> , 488 U.S. 336, 109 S. Ct. 633 (1989).....	<i>passim</i>
<u>Southern Ry. Co. v. Watts</u> , 260 U.S. 519, 43 S.Ct. 192 (1923).....	31

WEST VIRGINIA SUPREME COURT OF APPEALS CASES

<u>Crouch v. County Court of Wyoming County</u> , 116 W. Va. 476, 181 S.E. 819 (1935)	26, 27
<u>Dodd v. Potomac Riverside Farm, Inc.</u> , --- S.E.2d ---, 2008 WL 2390159 (W.Va. 2008).....	16
<u>Durm v. Heck's, Inc.</u> , 184 W.Va. 562, 401 S.E.2d 908 (1991)	16
<u>E. America Energy Corp. v. Thorn</u> , 189 W. Va. 75, 428 S.E.2d 56 (1993)	18, 26, 27
<u>Gilbert v. County Court of Wyo. County</u> , 121 W. Va. 647, 5 S.E. 2d 808 (1939)	7
<u>Gunn v. Hope Gas, Inc.</u> , 184 W.Va. 600, 402 S.E. 2d 505 (1991)	15
<u>Hubbard v. State Farm Indem. Co.</u> , 213 W. Va. 542, 550, 584 S.E.2d 176 (2003)	16
<u>In re Tax Assessment of Foster Foundation's Woodlands Retirement Community</u> , ___ S.E.2d ___, 2008 WL 4868290, November 5, 2008 (No. 33891)	7, 8, 9, 32
<u>Killen v. Logan County Commission</u> , 170 W. Va. 602, 295 S.E.2d 689 (1982)	7, 18
<u>Kline v. McCloud</u> , 174 W.Va. 369, 326 S.E.2d 715 (1984)	<i>passim</i>
<u>Petition of Maple Meadow Min. Co. for Relief from Real Property Assessment for Tax Year 1992</u> , 191 W. Va. 519, at 527, 446 S.E.2d 912, at 920 (1994)	29, 30
<u>W. Pocahontas Properties, Ltd. v. Count Commission of Wetzel County</u> , 189 W. Va. 322, 431 S.E.2d 661 (1993)	17, 28

OTHER JURISDICTIONS

<u>Meyer v. Cuyahoga County Board of Revision</u> , 390 N.E.2d 796 (Ohio 1979).....	27, 29
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WEST VIRGINIA STATUTORY AUTHORITY

W.Va. Code § 11-1A-3 (2008)	22
W. Va. Code § 11-1C-1 (2008)	29
W. Va. Code § 11-3-1 (2008)	18, 19
W.Va. Code § 11-3-1b (2008)	5
W.Va. Code § 11-3-2 (2008).....	18, 19
W. Va. Code § 11-3-19 (2008).....	18
W. Va. Code § 11-3-24 (2008)	18, 19
W.Va. Code § 11-3-25 (2008)	7

ADMINISTRATIVE AUTHORITY

W. Va. C.S.R. § § 189-2-1, <i>et seq</i> (2006)	19, 20
W. Va. C.S.R. § § 189-2-2.2	19

RULES OF CIVIL PROCEDURE

Rule 3(d) West Virginia Rules of Appellate Procedure	13
Rule 12(c) of the West Virginia Rules of Civil Procedure Rule 54(b)	15
Rule 54(b) of the West Virginia Rules of Civil Procedure Rule 54(b)	15

OTHER AUTHORITY

West Virginia State Tax Department Administrative Notice 2006-16 (January 31, 2006)	20, 22, 30
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VII. ARGUMENT AND DISCUSSION OF LAW

A. THE CIRCUIT COURT CORRECTLY HELD THAT MOUNTAIN AMERICA, LLC WAS THE SOLE PROPERTY OWNER WHICH PERFECTED AN APPEAL.

The Appellants argue that all sixty one (61) parties named in the Petition for Appeal before this Court properly perfected an appeal before the Circuit Court of Monroe County, West Virginia objecting to their ad valorem property tax assessments for the 2007 tax year. However, with the exception of the first named party, Mountain America, LLC, none of the remaining named parties properly perfected an appeal before the Circuit Court of Monroe County. The Circuit Court correctly held on July 17, 2007, that Mountain America, LLC, was the sole property owner which had perfected an appeal to the Circuit Court from the finding by the Board of Equalization and Review confirming the 2007 property tax assessments.

None of the other sixty (60) named parties to this Appeal were before the Circuit Court or subject to the Order entered on January 25, 2008, denying Mountain America LLC's Petition for Appeal from *ad valorem* property tax assessments. Instead, those parties had been dismissed from the proceeding several months before entry of the Order on January 25, 2008. In fact, the only parcels at issue in the present matter are as follows:

Property Owner	District Map/ Parcel No.	Description	2007 Assessed Value	2007 Fair Market Value	2007 Real Property Taxes
Mountain America, LLC	07-10-42.2	.10 Ac, NR Union WS St Sec Rt 219/6	\$300.00	\$500	\$6.40
Mountain America, LLC	07-10-23	.43 Ac Knobs SS St Sec Rt 10	\$1,500	\$2,500	\$31.96
Mountain America, LLC	07-10-30	5.03 Ac Caulders Peak SS St Sec	\$16,200	\$27,000	\$345.20
Mountain America, LLC	07-10-29.1	123.89 Ac Caulders Peak SS St Sec	\$398,820	\$664,700	\$8,498.06
Mountain America, LLC	07-10-29.8	6.26 Ac Caulders Peak SS St Sec 219/6	\$20,160	\$33,600	\$429.58

Leading up to and following the Hearing held by the County Commission, sitting as the 2007 Board of Equalization and Review, on February 7, 2007, significant issues existed as to the exact parties represented by counsel at the Hearing. While Mountain America, LLC, was the developer of the Walnut Springs Mountain Reserve subdivision, it remained unclear exactly which additional parties had properly filed with the Assessor for review of their individual tax assessments. To further complicate the matter, upon the finding by the County Commission sitting as the Board of Equalization that the Assessor had properly valued the subject properties, it was never apparent exactly which property owners sought to appeal the finding to the Circuit Court and which were satisfied by the finding of the Board of Equalization and Review. For this reason, the Circuit Court of Monroe County confirmed that Mountain America, LLC was the sole party to have properly perfected an appeal from the earlier Hearing of the Board of Equalization.

Accordingly, Mountain America, LLC, is the sole landowner properly before this Court. While Rule 3(d) of the Rules of Appellate Procedure allows for Joint and Consolidated Appeal, the Rule specifically applies only "[i]f two or more persons are entitled to appeal from a judgment or order of a lower tribunal and their interests are such that joinder may properly be made." While arguably the overall *ad valorem* tax valuation of the property in a subdivision originally developed by Mountain America, LLC, is of interest to the persons who purchased property within the subdivision, this casual interest in the taxable valuation of the unsold residue is insufficient to permit those persons to now become Appellants to an appeal from an Order to which they were not subject. They simply were not parties to the tax valuation appeal before the Circuit Court of Monroe County, their property interests were not considered by the Order of the Circuit Court, and they now remain strangers to this Court.

In determining that Mountain America, LLC, was the sole property owner which properly perfected its appeal, the Circuit Court specifically found that "[i]n this matter, neither the initial order, the petition, nor the civil information case sheet reflects the identity of any petitioner other than Mountain America, LLC. . . . To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of Appellants [other than Mountain America, LLC] or the tax parcels in question. A review of the record of the Hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10." Order of the Circuit Court of Monroe County, July 17, 2007. Accordingly, all party Appellants, with the exception of Mountain America, LLC, should be dismissed from this appeal as not being subject to the Order of the Circuit Court, dated January 25, 2008, affirming the findings of the County Commission sitting as the Board of Equalization and Review, from which Appellants now seek relief.

The Order of the Circuit Court entered on July 17, 2007, confirming Mountain America, LLC as the sole property owner which had perfected its appeal before the Circuit Court effectively dismissed any claim of the remaining named party Appellants, and accordingly, was a final Order so as to render the present appeal untimely for all named party Appellants with the exception of Mountain America, LLC. To the extent any named party Appellant may show that it was in fact before the Circuit Court of Monroe County in July of 2007, the "Order Granting County Commission's Motion to Confirm Mountain America, LLC, as the Sole Property Owner which has Perfected an Appeal" entered by the Circuit Court of Monroe County on July 17, 2007, was a final adjudication in nature and ended litigation on the merits insofar as it related to the interests and claims of all named party Appellants other than Mountain America, LLC.

Neither the Petition nor the underlying record from the Circuit Court of Monroe County indicates an interest by named party Appellants with the exception of Mountain America, LLC to the underlying Order in this appeal. Even if one grants the named party Appellants the benefit of the doubt that they may have made an appearance before the Circuit Court jointly and through counsel for Mountain America, LLC, the Order of July 17, 2007, was final so as to require appeal by those parties within four months following the entry of that Order, by November 17, 2007. Consequently, any appeal now by those named party Appellants, with the exception of Mountain America, LLC, should be denied as being untimely since it should have been asserted as an appeal of the Order of the Circuit Court entered on July 17, 2007.

The Circuit Court's Order which confirmed Mountain America, LLC, as the sole property owner to have perfected its appeal amounted to a Judgment on the Pleadings pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure against all potential parties with the exception of Mountain America, LLC. The granting of a Rule 12(c) motion against a party upon consideration of the record converts that motion into a motion for summary judgment under Rule 56 of the Rules of Civil Procedure. Gunn v. Hope Gas, Inc., 184 W.Va. 600, 402 S.E. 2d 505 (1991). The availability of appeal from summary judgment in matters relating to multiple parties is governed by Rule 54(b) of the Rules of Civil Procedure.¹

¹ Rule 54(b) of the West Virginia Rules of Civil Procedure states:

"Judgment upon multiple claims or involving multiple parties.-When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The requirement within Rule 54(b) that a judgment be expressly determined to be final is not a strict requirement. "Generally, an order qualifies as a final order when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991)(*citations omitted*). Further, this Court stated that "[w]ith the enactment of Rule 54(b), an order may be final prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or party." Durm v. Heck's, Inc., *supra*.

The Circuit Court's refusal to recognize any party to the appeal from the Board of Equalization and Review other than Mountain America, LLC, was a final adjudication on the merits as to any potential party seeking an audience before the Circuit Court. As a final adjudication on the merits, appeal to this Court would have been immediately appropriate and available to any purportedly aggrieved party up to and including November 17, 2007, being four months following the Order. As none of these potentially aggrieved, yet unidentified, parties brought a petition to appeal the Circuit Court's Order which refused to recognize them as additional parties to the Circuit Court proceeding, any attempted appeal at this time should be denied as being untimely.

The holding in Durm has been widely acknowledged and extended by this Court recognizing that the right to an appeal following summary judgment is not equivalent to the necessity of appeal. "[S]imply because an order *may* be appealed pursuant to *Durm* does not require that it *must* be appealed prior to entry of the final order in the case. Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 550, 584 S.E.2d 176 (2003) ("although we have *permitted* a party to take a petition for appeal from a *Durm*-type order, we have never *required* such an appeal." (emphasis in original)) Dodd v. Potomac Riverside Farm, Inc., ___ S.E.2d ___, 2008 WL 2390159 (W.Va. 2008). However, it is noteworthy that each case considering appeal from a *Durm*-type order involves either the dismissal of one of multiple claims, or one of multiple parties, against the interests of a party which remained

in the action to its conclusion. There is no precedent for allowing a party dismissed from an action for failure to state a claim upon which relief may be granted to ride the coattails of another party with a valid claim until the conclusion of that valid claim, and only then assert its right to appeal despite the fact that the dismissed party was not subject to the ultimate judgment on the valid claim.

If a party is found to have no valid claim upon which relief may be granted by the Circuit Court, the pendency of a valid claim of a co-petitioner should have no bearing on the dismissed party's ability to seek redress through appeal to this Court. Thought of another way, had Mountain America, LLC, been successful in its appeal to the Circuit Court from the finding of the Board of Equalization and Review, unnamed Appellants would not have benefited with lower tax assessments as they remained unidentified and specifically excluded by the Court from its determination. Accordingly, any petition for appeal by a party believed to have been aggrieved by the Circuit Court's Order of July 17, 2007, confirming Mountain America, LLC, as sole party, must have been maintained by November 17, 2007, or be denied as an untimely appeal from the wrong Order.

B. THE CIRCUIT COURT CORRECTLY AFFIRMED MOUNTAIN AMERICA, LLC'S, AD VALOREM PROPERTY TAX ASSESSMENTS FOR THE 2007 TAX YEAR.

Contrary to the Appellants' assertions, Donna Huffman, as the Assessor of Monroe County, West Virginia, utilized the correct valuation methodology in determining the "true and actual value" of the residue owned by Mountain America, LLC as proscribed by the West Virginia Legislature and corresponding state regulations. "It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." Syl. Pt. 1, W. Pocahontas Props., Ltd. v. Count Comm'n of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661 (1993). The Appellants have failed to carry their burden in this action.

1. Donna Huffman, as the Assessor of Monroe County, complied with all data and collection procedures required by West Virginia law.

The taxation process in West Virginia is comprised of two important components: valuation and levying. The only question presented to the Circuit Court was whether or not the land in Walnut Springs Mountain Reserve owned by Mountain America, LLC has been overvalued by the Assessor. Valuation is the process of determining the value of each piece of property. W.Va. Code § 11-3-2 (2008). The county assessor is charged with assessing the value of all property located within the county. Pursuant to W. Va. Code § 11-3-1 (2008), Ms. Huffman must assess property yearly as of July 1 at its "true and actual value."

The term "value," as used in Article X, Section 1 of the West Virginia Constitution, means the "worth in money" of a piece of property, i.e. its market value. Syl. Pt. 3, Killen v. Logan County Comm'n, 170 W. Va. 602, 295 S.E.2d 689 (W.Va. 1982). Further, "true and actual value" is defined as "the price for which such property would sell if voluntarily offered for sale by the owner." W. Va. Code § 11-3-1. This Court has consistently recognized that as long as the property changes hands in an arm's length transaction, the price paid for the property is strongly indicative of its true and actual value. E. Am. Energy Corp. v. Thorn, 189 W. Va. 75, 78, 428 S.E.2d 56, 59 (1993).

The Legislature has given the county assessors from July 1 to January 30 of the next ensuing year to complete the assessment of each item of property located within the county. W.Va. Code § 11-3-2. The assessor must complete his or her assessment and deliver the county land books containing the assessment values to the county commission, sitting as the Board of Equalization and Review, by February 1 of each year. W. Va. Code § 11-3-19 (2008). During the month of February, the county commission meets to review the assessments presented by the county assessor to determine if they are at "true and actual value." W. Va. Code § 11-3-24 (2008). Finally, a

majority of the county commissioners must certify that the annual assessment of property at true and actual value has been completed. Id.

Donna Huffman, as the Assessor of Monroe County, is required to follow the legislative rules set forth in W. Va. C.S.R. §§ 189-2-1, *et seq.* (2006) in valuing real property for tax purposes. Pursuant to the regulations approved by the Property Valuation Training and Procedures Commission, the first step in the appraisal process is to collect and record the data which is essential to arriving at a sound estimate of value. W. Va. C.S.R. § § 189-2-2.2. The appraiser employs the following systematic procedure in collecting the data: verify routing number or parcel number; record or verify property owner's name, mailing address, and legal description; record property class; record the tax class; record the neighborhood code; record card number; record property address; and record property factors. Id.

Ms. Huffman testified at the Hearing of February 7, 2007, that she verified the property owner's name, address, and the description of the real property. *Hearing Transcript*, p. 100. After each transfer of real property in Monroe County, Ms. Huffman mailed to the purchaser a "Classification and Sales Confirmation Questionnaire" to confirm that the sales price of the property was the actual market value of the real property transferred. Id. In addition, she visually inspected the real property, determined the property class, recorded the neighborhood code, and determined the infrastructure of the development. Id. at 99, 101-103. Based on the foregoing, it is readily apparent that Ms. Huffman complied with the data and collection procedures outlined in W. Va. C.S.R. §§ 189-2-1, *et seq.*

2. Walnut Springs Mountain Reserve is a unique geographical area located in Monroe County which necessitated the creation of a new neighborhood for assessment purposes.

For assessment purposes, an Assessor divides his or her county into "neighborhoods" giving consideration to similarities such as parcel size, road, topography, costs, type, and quality of improvements for land pricing. West Virginia State Tax Department Administrative Notice 2006-16 (January 31, 2006). A "neighborhood" is defined as "a geographical area exhibiting a high degrees of homogeneity in residential amenities, land use, economic and social trends, and housing characteristics." *Id.* If a subdivision or agricultural area is unique, it may stand alone as a single neighborhood. *Id.* In Monroe County, West Virginia, there are approximately fifty (50) different neighborhoods for assessment purposes. *Hearing Transcript* p. 97.

During the period of July 1, 2005, to June 30, 2006, the purchase price of the unimproved real property sold by Mountain America, LLC and its affiliated entities was significantly higher than any other unimproved real property being sold elsewhere in Monroe County, West Virginia. Additionally, no other comparable development exists in Monroe County offering amenities such as those touted by Walnut Springs Mountain Reserve. The Appellants argue that Longview Estates, an older residential development, is a comparable development to Walnut Springs Mountain Reserve. However, Longview Estates is a modest development established in 1984 and has thirty-eight (38) property owners. *Hearing Transcript*, Exhibit P-2. Real property in Longview Estates has a fair market value between \$6,000 and \$160,000.00 and the average lot size per owner is 3.55 acres. *Id.* Longview Estates has paved road, above ground utility lines, and well and septic systems. *Hearing Transcript* p. 39 -40. Unlike Walnut Springs Mountain Reserve, Longview Estates does not have "private roads" or underground utility lines. *Hearing Transcript*, Exhibit A-10, Declaration of Covenants, Conditions, Restrictions, Reservations and Easements for Walnut Springs Mountain

Reserve a Residential Home Development Near Union, West Virginia, dated April 8, 2005. Contrary to Appellants assertions, Longview Estates is not a comparable development to Walnut Springs Mountain Reserve.

As a result of the higher consideration being paid for the lots located in the Walnut Springs Mountain Reserve development and the uniqueness of the development itself, Donna Huffman, after consulting with the State of West Virginia Department of Revenue, created a new neighborhood which contained all of the real property located in the Walnut Springs Mountain Reserve development on Bud Ridge Road near Union, Monroe County, West Virginia. Contrary to the Appellants' argument, Donna Huffman did not arbitrarily designate the Appellants' properties as a separate neighborhood for property tax valuation purposes. In fact, an employee of GreenTree, LLC, a related entity of Mountain America, LLC, provided the Assessor with a map of the Walnut Springs Mountain Reserve development which illustrates the property contained in the development. Additionally, the Restrictive Covenants of record in the County Clerk's Office set forth the property to be included in the Walnut Springs Mountain Reserve development. Accordingly, the Appellants themselves defined the "neighborhood" utilized by Donna Huffman for property tax purposes.

As described in the Administrative Notice issued by the West Virginia State Tax Department, once the necessary data is complete, the Assessor utilizes real estate mass appraisal software called Computer Assisted Mass Appraisal (CAMA) to assist in calculating the "true and actual value" of the land and improvements. West Virginia State Tax Department Administrative Notice 2006-16 (January 31, 2006). Ms. Huffman utilized the CAMA software to assist in the appraisal process.

In calculating the 2007 real property assessments for the Walnut Springs Mountain Reserve neighborhood, Ms. Huffman compiled a list of sales in the development for the period from July 1, 2005, to June 30, 2006. Based upon the transfer values identified by the Assessor as being valid arm's length sales, the Assessor calculates a monetary per acre value of the parcels in the neighborhood. In calculating the "monetary per acre value," Ms. Huffman calculated the price per acre for each sale which occurred during the period from July 1, 2005, to June 30, 2006. Once the price per acre for each sale was calculated, Ms. Huffman took the average of all sales during the period of July 1, 2005, to June 20, 2006. The calculated monetary per acre value was \$29,236.00. Ms. Huffman then entered the neighborhood information into the real estate mass appraisal software (CAMA). After reviewing the data for each parcel, Ms. Huffman adjusted the monetary per acre value to \$26,900.00. Therefore, the "true and actual" land value for the Walnut Springs development for the 2007 tax year is \$26,900 per acre.

After Ms. Huffman entered all of the neighborhood values into the real estate mass appraisal software (CAMA), the software calculated the residual property value for the neighborhood in accordance with West Virginia State Tax Department Administrative Notice 2006-16 (January 31, 2006). The "true and actual value" of the residual property located in the Walnut Spring Mountain Reserve neighborhood is \$5,372 per acre. The residual property, or residue, is the real property owned by Mountain America, LLC (the developer) which has not yet been sold.

Finally, the assessed value is determined for the real property. The assessed value of real property is sixty percent (60%) of the market value regardless of its class or species. W. Va. Code § 11-1A-3 (2008). The assessed value of the residual property located in the Walnut Spring Mountain Reserve neighborhood is \$3,223 per acre.

3. The Appellants' real property is correctly valued and properly assessed by the Assessor.

During the Board of Equalization and Review Hearing on February 7, 2007, the Appellants failed to present testimony showing that the real property in question was overvalued and thus "wrongly assessed by the Assessor." The Appellants' assert that their expert, Todd Goldman, testified that the property in Walnut Springs was valued by the Assessor at an average value of 152% of the documented recent sales prices and therefore was overvalued by the Assessor. However, the Appellants' argument fails for two reasons.

First, the Appellants failed to provide testimony to the Board of Equalization and Review as to the true and actual value of the real property. Todd Goldman, the Appellants' expert witness, is a qualified appraiser of both residential and commercial property. However, Mr. Goldman failed to provide testimony as to his opinion of the true and actual value of the real property and in fact testified that he was not asked to conduct an appraisal of the properties in question. Accordingly, the disgruntled landowners failed to carry their burden of proof with respect to the true and actual value of the real property.

Second, the Appellants expert utilized sales data from period of September 1, 2004, to July 1, 2006, as the basis of his opinion that the real property in Walnut Springs is valued above its "true and actual value." A closer look at the sales data provided by the Appellants reveals that during the period in question, July 1, 2005 to June 30, 2006, the Assessor valued the property in Walnut Springs at an amazingly accurate average value of 97.46% of the recent sales prices. The Appellants' expert incorrectly used sales data from the period prior to July 1, 2005, in his calculation to skew the average value, ostensibly in an effort to mislead the Board of Equalization and Review. On the other hand, the Assessor correctly utilized the sales data from July 1, 2005, to June 30, 2006,

in calculating the "true and actual" land value for the Walnut Springs development for the 2007 tax year.

Since being elected as the Monroe County Assessor in 2005, Ms. Huffman has made tremendous strides in equalizing real property assessments in Monroe County. Ms. Huffman has not, as the Appellants assert, "specifically and intentionally" valued the property in the Walnut Springs development at a higher percentage of its true and actual value compared to other property in the county. Ms. Huffman has conformed with the valuation methodologies set forth by the West Virginia Legislature and State Tax Department regulations in the valuation of real property located in Monroe County. Accordingly, the Circuit Court correctly held that "the Assessor acted in conformity with the statutory authority; state regulations, and case law pertaining to her position as a county Assessor and in doing so, she valued the property appropriately within the guidelines prescribed by the West Virginia Code." Order, dated January 25, 2008.

C. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT MOUNTAIN AMERICA, LLC'S 2007 PROPERTY TAX ASSESSMENTS WERE NOT THE RESULT OF INTENTIONAL AND SYSTEMATIC UNDER-ASSESSMENT BY THE ASSESSOR OF OTHER TAXPAYERS' PROPERTIES IN MONROE COUNTY IN VIOLATION OF MOUNTAIN AMERICA, LLC'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION UNDER THE LAW.

The Appellants have failed to establish a violation of constitutional equal protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Appellants have failed to establish that any particular disgruntled landowners suffered a deprivation of the "rough equality" required under the Equal Protection Clause. Additionally, the Appellants have failed to show the extreme circumstances over many years necessary to establish an Equal Protection violation or the discriminatory intent to support such a claim.

1. Donna Huffman, the Assessor of Monroe County, did not violate the constitutional rights of the disgruntled landowners by basing their real property tax assessments on recent arm's-length purchase prices.

There is no state or federal constitutional defect in a system of taxation which bases assessments on recent arm's-length purchase prices and uses a general adjustment as a transitional substitute for individual reappraisals of all parcels within the county in a given year. *See, e.g. Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 109 S. Ct. 633 (1989). In *Allegheny Pittsburgh Coal Co.*, a decision relied upon by the Appellants, the United States Supreme Court specifically noted that disgruntled landowners have no constitutional complaint simply because their property is assessed for real property tax purposes at a percentage of the price paid for it in a recent arm's-length transaction. *Allegheny*, 488 U.S. at 342, 109 S.Ct. at 637. Accordingly, it was appropriate for Donna Huffman, the Assessor of Monroe County, to base the assessments in question on recent arm's-length purchase prices.²

When presented with similar constitutional challenges to real property tax assessments, this Court has recognized that the price paid by a willing buyer to a willing seller is often the best method of determining value. In *Kline v. McCloud*, 174 W.Va. 369, at 372, 326 S.E.2d 715, at 719 (1984), this Court recognized that "the price paid for a parcel of land in a recent arm's length transaction is an indicator of market value on a par with the testimony of a qualified appraiser." This Court then

² At the Board of Equalization and Review Hearing of February 7, 2007, the Assessor introduced evidence that Mountain America, LLC and its affiliated entities engaged in a rebate program with certain arm's-length purchasers of real property in the Walnut Springs Mountain Reserve development. Specifically, Salvatore J. Zambri noted on the "Classification and Sales Confirmation Questionnaire" that although the Declaration of Consideration on the Deed reflected that the consideration paid for his real property was \$249,995.00, he received a rebate of the purchase price in the amount of \$69,248.62. *See Hearing Transcript*, Assessors Exhibit 4. Additionally, Salvatore J. Zambri also noted on a second "Classification and Sales Confirmation Questionnaire" that although the Declaration of Consideration on the second Deed reflected that the consideration paid for the real property was \$99,995.00, he received a rebate of the purchase price in the amount of \$9,998.50. *See Hearing Transcript*, Assessors Exhibit 5. The Assessor of Monroe County based the assessments in question on the recent arm's-length purchase prices as reflected in the Deeds placed of record in the Office of the Clerk of the County Commission of Monroe County. For the Appellants to now complain that their properties are assessed at values in excess of their fair market value is disingenuous, at best, when it appears that they have inflated their own property values.

held, "the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value." Id. at 378, 326 S.E.2d at 724. In reaching this conclusion, this Court echoed the well-established principle first enunciated in Crouch v. County Court of Wyoming County, 116 W. Va. 476, 477, 181 S.E. 819, 819 (1935) that the "price paid for property is not conclusive as to value, but it may be a very important element of proof." In the present matter, Donna Huffman, as the Assessor of Monroe County, applied the principles enunciated in Kline and Crouch to determine that the average value of the property in Walnut Springs Mountain Reserve for tax purposes was 97.46% of the average sales prices for the relevant valuation period.

After the United States Supreme Court rendered its decision in Allegheny Pittsburgh Coal Company, *supra* in 1989, this Court revisited the propriety of utilizing recent arm's length transactions as an indication of value in the decision of Eastern American Energy Corporation v. Thorn, 189 W. Va. 75, 428 S.E.2d 56 (1993). In Eastern American Energy Corporation, this Court recognized that "W. Va. Code § 11-3-1 requires that property be assessed at the 'true and actual value'. 'True and actual value' means fair market value - - what property would sell for if sold on the open market." Id. at 78, 428 S.E.2d at 59. This Court then noted, "as long as the property changes hands in an arm's length transaction, the price paid for the property is strongly indicative of its true and actual value." Id. at 78, 428 S.E.2d at 59. Significantly, this Court then held "[a]n objection to any assessment may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-valued by the tax commissioner and wrongly assessed by the assessor." Id. 78-79, 428 S.E.2d at 59-60. In the present matter, Ms. Huffman relied upon arm's length transactions to determine the true and actual value of the real property in question. On the other hand, the disgruntled landowners failed to present any competent evidence as to the true and actual value of any of the multitude of tracts in

question. Accordingly, the Appellants failed to establish by clear and convincing evidence that the assessments were incorrect.

Ms. Huffman's reliance on arm's length purchase prices in accordance with the West Virginia decisions of Kline, Crouch, and Eastern American Energy Corporation is consistent with the procedure in other jurisdictions which have been faced with a similar question. In reviewing decisions from other jurisdictions, this Court has noted that "[c]ourts have rather uniformly rejected equal protection and uniformity of taxation arguments" in situations in which disgruntled landowners challenged the use of sale prices in reappraising property. Kline, *supra* at 374, 326 S.E.2d at 720. By way of example, in Meyer v. Cuyahoga County Board of Revision, 390 N.E.2d 796, 800 (Ohio 1979), the Supreme Court of Ohio held, "the best method of determining value is an actual sale of property between one who is willing but not compelled to buy and one who is willing but not compelled to sell." The Court in Meyer then echoed the law in West Virginia and other jurisdictions by noting that the determination of fair market value for tax assessment purposes is a question of fact "primarily to be determined by the taxing authorities." Id. at 800.

Based on the foregoing, Donna Huffman, the Assessor of Monroe County, did not violate the constitutional rights of the disgruntled landowners by basing their real property tax assessments on recent arm's-length purchase prices. In fact, in the proceeding below, Ms. Huffman was the only party who presented competent testimony as to the true and actual value of the real property in question. The disgruntled landowners failed to prove by clear and convincing evidence that the assessments in question are incorrect. In fact, the Appellants have yet to articulate what they believe the value of the tracts in question to be. Instead, they argue that other real property in Monroe County is underassessed by Ms. Huffman. Significantly, Appellants' expert witness, Todd Goldman failed to show how the assessments were illegal under West Virginia law or the United States

Constitution, or violated the rights of any individual landowner. He showed only anecdotal evidence that some other properties in Monroe County had been historically underassessed. Such statistical allegations are insufficient to overcome the presumption that Ms. Huffman's appraisals of the tracts in question are correct, particularly since "a reviewing court will not interfere with the conclusions reached by an assessing body, unless the assessment made is clearly illegal or grossly and palpably wrong on the facts." Western Pocahontas Properties, Ltd. v. County Com'n. of Wetzel County, 189 W. Va. 322, at 236, 431 S.E.2d 661, at 665.

2. **Any perceived transitional inequality arising from the abundance of sales by Mountain America, LLC in the relevant time period does not violate the constitutional rights of the disgruntled landowners.**

In West Virginia, and throughout the United States, the constitutional requirement for tax assessments is "the seasonable attainment of a rough equality in tax treatment of similarly- situated property owners." Allegheny Pittsburgh Coal Company, supra at 343, 109 S. Ct. at 638. Any perceived transitional inequality resulting from the abundance of sales in Monroe County by Mountain America, LLC and its affiliated entities in the relevant time period does not violate the Equal Protection Clause of the Fourteenth Amendment or the Equal and Uniform Clause of Section 1 of Article X of the West Virginia Constitution. Neither the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution nor Section 1 of Article X of the West Virginia Constitution requires immediate general adjustments by an assessor. Allegheny Pittsburgh Coal Company, supra at 343, 109 S. Ct. at 638. Instead, a transitional delay is acceptable.

The Supreme Court of Appeals of West Virginia specifically addressed this issue in Kline, supra. In analyzing whether or not immediate county-wide reassessments are a constitutional requirement, the Court lucidly observed:

[t]he system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect

equality in taxation would be utopian, but yet as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle.

Kline at 374, 326 S.E.2d at 720. This is based on the acknowledgement that, as a matter of practicality, all of the parcels in a county cannot be revalued at one time. See, e.g. Meyer, *supra* at 800.

In order to address the concerns of taxpayers as to the appropriate timeframe for remedying any perceived transitional inequalities in taxation, the West Virginia Legislature has established a three-year timeframe for valuing property in each county. W. Va. Code § 11-1C-1 (2008). Specifically, W. Va. Code § 11-1C-1(c) provides:

requiring the valuation of property to occur in three-year cycles with an annual adjustment of assessments as to those properties for which a change in value is discovered shall not violate the equal and uniform provision of section one, article ten of the West Virginia Constitution.

As discussed above, Ms. Huffman, as the Assessor of Monroe County, has fully complied with the foregoing statutory requirement. In fact, she would have been remiss if she had not made adjustments to the assessments of the disgruntled landowners based on her discovery of a "change in value" arising from the glut of sales in Walnut Springs between July 1, 2005, and June 30, 2006.

In its post-Allegheny Pittsburgh Coal Company analysis of perceived transitional inequality in assessments, this Court acknowledged, "[t]he general adjustments and any transitional inequalities that may result will only last three years. [W. Va. Code § 11-1C-1(c)] will rectify inequity and the duration of any disparity is short. The corollary to all of this is equality." Petition of Maple Meadow Min. Co. for Relief from Real Property Assessment for Tax Year 1992, 191 W. Va. 519, 527, 446 S.E.2d 912, 920 (1994). This Court then held that the constitutional requirements of equal and uniform treatment are "satisfied when general adjustments are utilized over a short period of

time to equalize the differences existing among taxpayers regarding property valuation and assessments." *Id.* at 527, 446 S.E.2d at 920. Accordingly, perceived inequalities in assessments for a given year arising from an abundance of recent sales do not rise to the level of a constitutional violation. Instead, a disgruntled landowner must establish a history of unequal treatment of similarly-situated property owners. Because of the recent nature of the sales in the present matter, the Appellants cannot offer any evidence establishing that Ms. Huffman, as the Assessor of Monroe County, had intentionally and systematically departed from a standard of practical equality over an extended period of time. Assuming arguendo that Ms. Huffman's predecessor-in-interest historically undervalued all of the real property in Monroe County, that does not establish an intentional, systematic, and unequal assessment for the tax year in question.. In fact, the uncontroverted evidence in the present matter establishes that Ms. Huffman, as the Assessor of Monroe County, has acted to remove any perceived discrimination by raising the assessments of all real property in Monroe County in accordance with the three-year process mandated by the West Virginia Code and decisions there under.

3. Donna Huffman's delineation of Walnut Springs Mountain Reserve as a separate neighborhood was neither arbitrary nor capricious since the property outside of Walnut Springs Mountain Reserve is not similarly situated to that located within the development.

As discussed above, Donna Huffman, as the Assessor of Monroe County, complied with West Virginia State Tax Department Administrative Notice 2006-16 in treating Walnut Springs Mountain Reserve as a separate neighborhood. Specifically, she utilized the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Reservations and Easements for Walnut Springs Mountain Reserve a Residential Home Development Near Union, West Virginia Dated April 8, 2005 (Restrictive Covenants) placed of record by Mountain America, LLC and its affiliated entities in the Office of the Clerk of the County Commission of Monroe County to delineate the boundaries of the

neighborhood. Ironically, the disgruntled landowners now argue that the same property they have successfully touted as being a unique rural community-living environment with amenities, is no different than other real property in Monroe County.

In Allegheny Pittsburgh Coal Company, *supra* at 337, 109 S.Ct. at 634, the Supreme Court of the United States acknowledged that "[t]he Equal Protection Clause [of the United States Constitution] permits a State to divide different kinds of property into classes and to assign each a different tax burden so long as those divisions are neither arbitrary nor capricious." Similarly, the Supreme Court of the United States has noted that "differences in the classes of property, and in the conditions of ownership, obviously made difference in treatment unavoidable. Differences in the machinery for assessment or equalization do not constitute a denial of equal protection of the laws." Southern Ry. Co. v. Watts, 260 U.S. 519, 525, 43 S.Ct. 192, 195 (1923).

Additionally in Allegheny, the Supreme Court of the United States based its decision on the premise that the Petitioners' property and the surrounding allegedly underassessed properties were "comparable." Such premise was based solely on the record below, which included an agreed upon stipulation which provided that "the properties surrounding the properties owned by ... Petitioners... are comparable properties in that they are substantially the same geologically as the properties of the Petitioners." Allegheny, 488 U.S. 336, 340, 109 S.Ct. 633, 636 n.3 (quoting trial record at 1319-20).

In the present matter, a dispute exists as to whether or not the Appellants properties and the allegedly underassessed surrounding properties are "comparable." It is the position of the Assessor that the real property owned by the disgruntled landowners is unique. A careful analysis of the Restrictive Covenants consisting of thirty-seven (37) pages placed of record in the Office of the Clerk of the County Commission of Monroe County, reveals the existence of an "Architectural Design Review Board", a "Homeowners' Association", voluminous restrictive covenants, and even

"Equestrian Provisions" which mandate the manner of care, feeding, visitation, pasturing, and fencing of horses in Walnut Springs Mountain Reserve. Accordingly, any comparison between the Walnut Springs property and other property in Monroe County is of limited efficacy since the Walnut Springs property is not truly comparable to that of the surrounding properties. Based on the foregoing, Donna Huffman's delineation of Walnut Springs Mountain Reserve as a separate neighborhood was neither arbitrary nor capricious. Accordingly, the Circuit Court correctly affirmed the decision of the Monroe County Commission, sitting as the 2007 Board of Equalization and Review, finding that the Assessor's appraisal methods were entirely consistent with West Virginia Law.

D. THE PROCESS BY WHICH A TAXPAYER MUST APPEAL AN AD VALOREM PROPERTY TAX ASSESSMENT DOES NOT VIOLATE THE APPELLANTS' RIGHTS TO DUE PROCESS OF LAW.

Mountain America, LLC argues that the members of the County Commission of Monroe County have a direct personal pecuniary interest in the outcome of property tax assessment challenges. This argument is without merit. The appeal procedure does not create a conflict of interest and does not unconstitutionally violate disgruntled taxpayers' rights to due process of law. This Court recently held that W.Va. Code § 11-3-24, which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional. In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, ___ S.E.2d ___, 2008 WL 4868290, November 5, 2008 (No. 33891). The Assessor of Monroe County agrees with this Court's recent ruling that the system of tax appeals as it presently exists has proven to be fair, just, and equitable. The Assessor of Monroe County, in light of this Court's recently ruling in Woodlands, respectfully gives deference to this Court's analysis in its discussion in the Woodland's opinion and therefore will not brief this issue in

any further detail. Accordingly, the Circuit Court of Monroe County correctly concluded that West Virginia's statutory system for the review of property tax assessments does not violate the Appellants' rights of due process of law.

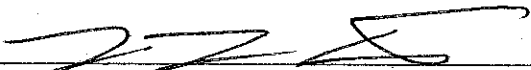
VIII. CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing, Mountain America, LLC has failed to prove by clear and convincing evidence that the Assessor's valuation of its real property for purposes of *ad valorem* property taxation was incorrect. The decision of the Circuit Court of Monroe County is adequately supported by the evidence in the record and should be affirmed, particularly in light of the failure of the disgruntled landowners to offer any concrete evidence as to their estimate of the value of the real property in question. Accordingly, Donna Huffman, as the Assessor of Monroe County, West Virginia, respectfully requests that this Court deny Appellants' prayer for relief and affirm the assessed values as determined by the Assessor of Monroe County, West Virginia and affirmed by the Monroe County Commission, sitting as the 2007 Board of Equalization and Review.

Respectfully submitted,

DONNA HUFFMAN, AS THE ASSESSOR OF
MONROE COUNTY, WEST VIRGINIA

By Counsel



John F. Hussell, IV - WV Bar No. 6610

Katie L. Hoffman - WV Bar No. 9672

Joseph J. Buch - WV Bar No. 6014

DINSMORE & SHOHL, LLP

P.O. Box 11887

Charleston, WV 25339-1887

(304) 357-0900

(304) 357-0919

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34426

MOUNTAIN AMERICA, LLC, ET AL.

Appellants,

v.

THE HONORABLE DONNA HUFFMAN,
ASSESSOR OF MONROE COUNTY, WEST VIRGINIA,
ET AL.

Appellees.

CERTIFICATE OF SERVICE


The undersigned, of counsel for Donna Huffman, as the Assessor of Monroe County, West Virginia, does hereby certify that the foregoing **Response of Appellee, Donna Huffman, Assessor of Monroe County, West Virginia to Appellants' Brief** has been served upon the following by this day mailing to them, by first class mail, postage prepaid, a true copy thereof:

H. Rod Mohler, Esquire
Prosecuting Attorney of Monroe County
Monroe County Courthouse
Box 740
Union, WV 24983

Paul G. Papadopoulos, Esquire
David K. Higgins, Esquire
Robinson & McElwee, PLLC
P.O. Box 1791
Charleston, WV 25236
Counsel for the Monroe County Commission

Robert S. Kiss, Esquire
Michael E. Caryl, Esquire
Bowles Rice McDavid Graff & Love, LLP
P.O. Box 1386
Charleston, WV 25325-1386
Counsel for Mountain America, LLC

This 17th day of December, 2008.



John F. Hussell, IV